

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

MINH TRUNG LY d/b/a
M & H AUTO REPAIR & BODY WORK,

Appellant,

v.

PUGET SOUND AIR POLLUTION
CONTROL AGENCY,

Respondent.

PCHB NO. 93-10

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER.

This matter came on for hearing before the Pollution Control Hearings Boards on Thursday, September 23, 1993, in the Board's offices in Lacey, Washington. In attendance for the Board were Robert v. Jensen, Chairman, and Richard C. Kelley, Member, with John H. Buckwalter, Administrative Appeals Judge, presiding. Proceedings were recorded by Betty J. Koharski, Certified Shorthand Reporter, of Gene Barker & Associates of Olympia, Washington.

At issue was the appeal of a \$10,000 civil penalty imposed by Puget Sound Air Pollutions Control Agency (the "Agency") on M & H Auto Repair and Body Shop ("M&H") for alleged violations of the Agency's Regulations.

Appearances for the parties were:

Minh Trung Ly, owner, pro se, for M&H, with Mr. Truc Nguyen translating for Mr. Ly.

Laurie S. Halvorson, Attorney, for the Agency.

Witnesses were sworn and testified, exhibits were examined and

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1 admitted, and closing arguments were heard. From these, the Board
2 makes these

3 FINDINGS OF FACT

4 1

5 M&H is owned and operated by Mr. Minh Trung Ly and is located at
6 5400 Martin Luther King Jr. Way South, in Seattle, Washington.

7 2

8 On October 22, 1992, at 3:30 p.m., Mr. Joseph Eng, a Lead
9 Inspector (the "Inspector") for the Agency, visited M&H because of
10 complaints which had been received by the Agency about spray painting
11 operations at that facility.

12 3

13 Upon arrival at M&H, the Inspector heard the sound of an air
14 compressor and, through a cyclone fence, saw Mr. Ly using a spray gun
15 to apply gray-colored primer to the left rear fender of a small car.
16 The spray gun was attached to a long hose coming from an air
17 compressor.

18 4

19 The car was within a paint spray booth the doors of which were
20 open. The booth did not have a filtering system for capturing
21 overspray and did not have a vertical stack for fume dispersal.

22 5

23 The Inspector testified that he took three photographs of Mr. Ly
24 using the spray gun to apply the gray primer, but subsequently, when
25 the film was developed, the Inspector found that the entire roll

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2

1 (which contained other photos taken at other sites after the M&H
2 inspection) was defective.

3 6

4 The Inspector entered the premises and introduced himself to
5 Mr. Ly, and they entered the spray paint booth where the Inspector
6 observed an open can of PPG Kondar Acrylic Primer Surfacer (DZ3 Light
7 Gray) which matched the gray color paint on the car fender and on
8 Mr. Ly's hands. When asked if the primer used on the car came from
9 the can, Mr. Ly nodded a "yes". The Inspector also saw a paint spray
10 gun on the floor next to the car and smelled the odors of paint and
11 paint thinner. A Product Information brochure from PPG Industries,
12 the manufacturer of the Kondar primer, lists the primer's test
13 properties as including VOC (Volatile Organic Compound) contents.

14 7

15 The Inspector informed Mr. Ly that his spray booth was illegal
16 because it did not have a filtering device and vertical stack and,
17 also, that it was unlawful to apply any materials containing VOC with
18 the type of spray gun being used but that the use of handheld spray
19 cans would be permitted. The Inspector also explained the Agency's
20 Notice of Construction requirements for paint spray booths, and Mr. Ly
21 asked that another set be sent to him because he had thrown away a set
22 which had been sent to him previously in March of 1992.

23 8

24 On returning to Mr Ly's office, the Inspector issued notice of
25 Violation, No. 28027, to Mr. Ly which he signed in acknowledgment of
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3

1 receipt. By a subsequent letter to the Agency, dated October 28,
2 1992, Mr. Li stated that "I wish to admit the violation of spraying
3 the primer on the car with a spayed (sic) hand gun" and "I would like
4 to propose for a correction of this violation by stop (sic) spraying
5 the paint." Mr. Ly also asked in his letter whether he could spray
6 occasionally while waiting for a new lease from the property owner, to
7 which the Agency replied in the negative. Subsequently, on November
8 11, 1992, the Inspector notified Mr. Ly by telephone that he (Mr. Ly)
9 could not continue to paint with the spray gun while waiting for a new
10 lease and construction of a legal spray booth. Mr. Ly agreed to
11 discontinue using the spray gun.

12 9

13 After reviewing the Agency's M&H enforcement file, the Inspector
14 recommended imposition of a \$10,000 civil penalty on M&H. The file
15 included an Agency Notice of Complaint sent to M&H on November 16,
16 1988, and received by Mr. Ly on November 17, 1988, which advised him
17 of a number of citizen complaints about illegal spraying and ensuing
18 odors. The Notice also defined the Agency's regulatory requirements
19 for spray painting equipment and requested a corrective action
20 response within ten days.

21 10

22 The enforcement file also included a Routine Inspection Report
23 written by another Agency Inspector on March 10, 1992 and a follow-up
24 Notice of Violation 28220 issued on March 10, 1992, citing M&H for
25 "Failure to vent exhaust through filter device and vertical stack".

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4

On December 16, 1992, by issuance of Notice and Order of Civil Penalty No. 7702, the Agency, as recommended by the Inspector, imposed a civil penalty of \$10,000 on M&H for the alleged violation of Section 9.16(a) of the Agency's Regulation I by having

Caused or allowed the spraying of VOC-containing material without using an enclosed spray area with vertical stack or filtering system at 5400 Martin Luther King Jr. Way South in Seattle, Washington.

Notice 7702, which was received by Mr. Ly on December 17, 1992, also enclosed a Consent Order and Assurance of Discontinuance which suspended \$5,000 of the penalty. Mr. Ly did not sign the Consent Order. Instead, by letter to the Agency, dated December 30, 1992, Mr. Ly requested "remission or mitigation" of the penalty because the Inspector hadn't seen him using a spray gun and the penalty was unjust.

Following a meeting of Mr. Ly and Agency personnel to discuss the situation, Mr. Ly, in a letter to the Agency dated April 28, 1993, first stated that "...we have never thought that using spray equipment would violate the law or regulations" and then disclaimed such use by alleging that "Mr. Joseph Eng only saw the paint sprayer in the corner of the room; he did not see me actually painting or spraying (and) the truth is that...we had never used it but had used a hand sprayer."

Following a meeting between Mr. Ly and Agency personnel, the

1 Agency refused to accept Mr. Ly's offer to pay \$500 and, by letter
2 dated April 29, 1993, offered instead to mitigate the penalty to
3 \$2,500 payable with \$7,500 suspended. By letter dated May 4, 1993,
4 M&H refused the Agency's offer and subsequently filed this appeal with
5 the Board.

6 15

7 Any Conclusion of Law which is deemed to be a Finding of Fact is
8 hereby incorporated as such. From these Findings of Fact, the Board
9 makes these

10 CONCLUSIONS OF LAW

11 1.

12 The Board has jurisdiction over the subject and parties of this
13 appeal. RCW's 70.94.431, 43.21B.110, 43.21B.310. Respondent Agency
14 has the burden of proof. WAC 371-08-183.

15 2.

16 The Board takes judicial notice of the Agency's Regulation I.
17 Section 9.16(a) of Regulation I states that:

18 *It shall be unlawful for any person to cause or allow the*
19 *use of spray equipment to apply any VOC-containing*
20 *material...unless the operation is conducted inside an*
21 *enclosed spray area that is registered with the Agency and*
22 *incorporates either dry filters or water wash curtains to*
control the overspray...The exhaust from the spray area
shall be vented to the atmosphere through a vertical
stack...

23 Section 16(b) then exempts "the use of hand-held aerosol cans"
24 from the above requirements.

25 3.

26 Mr. Ly maintains that he did not use the illegal spray gun on the

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1 day of the Inspector's visit, October 22, 1992, and that he had never
2 used it, but that he had used only legally permitted hand spray cans
3 in his operations. In assessing these claims, we consider the
4 following.

5 4.

6 The Inspector's direct testimony was that he heard and saw an
7 compressor with a hose leading to a spray gun which was being
8 operated by Mr. Ly. This testimony could have been put into doubt by
9 the contrary testimony of M&H employees who, according to the
10 un rebutted testimony of the Inspector, were present at the facility on
11 that day. No such witnesses were presented nor any such testimony
12 elicited by Mr. Ly to substantiate his own self-serving claim.

13 5.

14 Mr. Ly stated in his letter of October 29, 1992, to the Agency
15 (ref. Finding 13 above) that "I would like to admit the violation of
16 spraying the primer on a car with a spayed (sic) hand gun" and "I
17 would like to propose for (sic) a correction of the violation by stop
18 (sic) spraying the paint". From these statements, the Board concludes
19 that at the time he wrote that letter Mr. Ly knew that the equipment
20 he was using constituted a violation. Then, in his letter of December
21 30, 1992, he admitted that he had sprayed the primer (but only "one
22 time"), and it was not until the civil penalty had been assessed that
23 Mr. Ly. in his May 4, 1993 letter claimed that the Inspector "did not
24 see me actually painting or spraying".

1 6.

2 Mr. Ly claims that, because he does not speak English well, he
3 did not really understand that he could be subject to a civil penalty
4 until the Notice of Civil Penalty arrived.

5 The Washington Clean Air Act, 70.94 RCW, which authorizes the
6 levying of penalties for infractions as determined by air pollution
7 control agencies or authorities is a strict liability statute (RCW
8 70.94.040), and "Acts violating its implementing regulations are not
9 excused on the basis of intent" (Pearson Construction v. PSAPCA, PCHB
10 No. 88-186 (1989)), nor can they be excused because of lack of
11 knowledge or understanding.

12 7.

13 In summary of the above, we conclude that the Agency has
14 sustained its burden of proof and that M&H violated the Section
15 9.16(a) as alleged.

16 8.

17 In determining whether a penalty should be mitigated, the
18 Agency's history of any past violations by M&H carries great weight.
19 On November 16, 1988, the Agency issued a Notice of Complaint to M&H
20 in which it was noted that "...spray painting equipment is being
21 operated at the (M&H) site (and that Agency) records do not reflect
22 any notices of...equipment at (M&H) as required by law".

23 9.

24 The Agency submitted Exhibit R-8, an unsigned letter, dated
25 November 18, 1988, purporting to be from Mr. Ly in response to the
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1 Agency's Notice of Complaint. Mr. Ly objected to entry of the
2 exhibit, claiming that he did not remember the unsigned letter.
3 However, Mr. Ly testified that he, himself, did not write the other
4 letters which were signed by him because of a language difficulty, so
5 the letter very well could have been prepared and sent from M&H with
6 his signature inadvertently omitted. Furthermore, no evidence was
7 introduced nor is it easy to contemplate what other source would be
8 responsible for a letter so directly related to an M&H situation. We
9 conclude that the letter was from M&H and was an acknowledgment of a
10 prior spraying violation with a statement of anticipated corrective
11 action by M&H.

12 10.

13 Further violations by M&H are indicated in the Agency's Notice of
14 Violation No. 28220 of March 10, 1992, which described the violation
15 as "Failure to vent exhaust through filter device and vertical stack".
16 No response to this Notice was produced or entered into the record by
17 either party.

18 11.

19 We conclude that there is satisfactory evidence of M&H's
20 continuing failure to comply with the Agency's Regulations to justify
21 the \$10,000 penalty imposed by the Agency.

22 12.

23 The Board also concludes that further terms are warranted due to
24 two further considerations: the potential devastating effect of a
25 \$10,000 penalty on the continuance of a relatively new business with a

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1 consequential effect on its employees, and Mr. Ly's difficulties with
2 the English language which were exhibited by him in the hearing and
3 which may have contributed to a less than full understanding of the
4 Agency's Regulation I requirements.

5 13.

6 We conclude that the last offer of settlement made by the Agency,
7 with the addition of certain other conditions, is appropriate in
8 recognition of the necessity of making M&H fully cognizant of the
9 importance of observing all operational and facility requirements
10 while, at the same time, recognizing the above considerations which
11 are peculiar to this case.

12 14.

13 Any Finding of Fact deemed to be a Conclusion of Law is hereby
14 incorporated as such. From these Conclusions of Law the Board enters
15 the following

16 ORDER

17 THAT the Agency's imposition of a \$10,000 civil penalty on M&H is
18 AFFIRMED with \$7,500 suspended on the condition that M&H has no
19 further violations of the Agency's Regulations within the next two
20 years; and

21 THAT M&H shall pay \$2,500 to the Agency in installments of \$250
22 per month for the next ten (10) months to be due and payable on or
23 before such exact day of the month as designated by the Agency; and

24 THAT the Agency shall establish a training session or series
25 thereof, as it considers necessary, to thoroughly indoctrinate M&H in

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1 its responsibilities, operational methods, procedures or other
2 relevant factors required for adherence to the Agency's Regulations;
3 and,

4 THAT, as a further condition of the \$7,500 suspension, Mr. Ly,
5 along with such other M&H employees as may be designated by the Agency
6 or by M&H, shall attend such sessions with an interpreter whose
7 services will be the responsibility of M&H.

8 Done this 5th day of October, 1993

9
10 POLLUTION CONTROL HEARINGS BOARD

11 Robert V. Jensen
12 ROBERT V. JENSEN, Chairman

13 Richard C. Kelley
14 RICHARD C. KELLEY, Member

15 JOHN H. BUCKWALTER
16 Administrative Appeals Judge
17 Presiding
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